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No. 08-1340

IN THE

Supreme Court of the United States

MATTHEW WIGGENHORN, *ET AL.*,

Petitioners,

v.

AXA EQUITABLE LIFE INSURANCE COMPANY, *ET AL.*

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Fourth Circuit

BRIEF IN OPPOSITION

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QUESTION PRESENTED

After the defendants removed petitioners' state-law class-action securities complaints alleging deception, misrepresentation, and omission of material facts to federal court under the Securities Litigation Uniform Standards Act of 1998, Pub. L. No. 105-353, 112 Stat. 3227, petitioners amended their complaints. The amended complaints retained the same factual allegations, but generally deleted the express claims of misrepresentation or material omission. The question presented is:

Whether the court of appeals erred in summarily affirming the district court's conclusion, consistent with the uniformly applied artful pleading rule, that the complaints sought relief on grounds precluded by the Securities Litigation Uniform Standards Act, 15 U.S.C. §§ 77p(b) & 78bb(f)(1)(A).

RULE 29.6 DISCLOSURE

AXA Equitable Life Insurance Company is a wholly owned subsidiary of AXA Financial, Inc., which, in turn, is wholly owned by AXA, S.A. Other than AXA, S.A., no publicly held company owns 10% or more of the stock of AXA Equitable Life Insurance Company.

Nationwide Financial Services, Inc. is the parent corporation of Nationwide Life Insurance Company. In turn, Nationwide Corporation is the parent corporation of Nationwide Financial Services, Inc., and Nationwide Mutual Insurance Company is the parent corporation of Nationwide Corporation. No publicly held company owns 10% or more of the stock of Nationwide Life Insurance Company.

The Variable Annuity Life Insurance Company is a wholly owned subsidiary of American General Life Insurance Company, which itself is a wholly owned subsidiary of AGC Life Insurance Company, which, in turn, is a wholly owned subsidiary of AIG Life Holdings (US), Inc., which is a wholly owned subsidiary of American International Group, Inc. Other than American International Group, Inc., no other publicly held company owns 10% or more of the stock of The Variable Annuity Life Insurance Company.

The parent corporations of AIG SunAmerica Life Assurance Company are SunAmerica Life Insurance Company, AIG Retirement Services, Inc.,

and American International Group, Inc. Other than American International Group, Inc., no other publicly held company owns 10% or more of the stock of AIG SunAmerica Life Assurance Company.

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STATEMENT

1. Congress enacted the Securities Litigation Uniform Standards Act of 1998 ("SLUSA"), Pub. L. No. 105-353, 112 Stat. 3227, as part of a broader effort to promote uniformity in securities litigation and to curb abusive litigation. SLUSA reinforced the limitations on securities actions imposed three years earlier in the Private Securities Litigation Reform Act of 1995 ("PSLRA"), 15 U.S.C. §§ 77z-1, 78u, by preventing plaintiffs from using state-court actions to avoid the PSLRA's heightened pleading requirement and other limitations. *See generally Kircher v. Putnam Funds Trust*, 547 U.S. 633, 636 (2006); *Merrill Lynch, Pierce, Fenner & Smith Inc. v. Dabit*, 547 U.S. 71, 82 (2006).[1]

To that end, SLUSA makes federal courts the exclusive venue for most class actions alleging misrepresentations or material omissions in connection with the purchase or sale of "covered securities," 15 U.S.C. §§ 77p(f)(3), 78bb(f)(5)(E), and mandates that such actions be governed exclusively by federal securities law. More specifically, SLUSA provides that:

> No covered class action based upon the statutory or common law of any State or subdivision thereof may be maintained in any State or Federal court by any private party alleging –

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[1] The decline in federal securities class actions that occurred after the passage of the PSLRA was accompanied by a nearly identical increase in state court filings. *See* H.R. Conf. Rep. No. 803, 105th Cong., 2d Sess. 14 (1998).

> (1) an untrue statement or omission of a material fact in connection with the purchase or sale of a covered security; or
>
> (2) that the defendant used or employed any manipulative or deceptive device or contrivance in connection with the purchase or sale of a covered security.

15 U.S.C. § 77p(b) (amendment to the Securities Act of 1933, 48 Stat. 74); *accord* 15 U.S.C. § 78bb(f)(1)(A) (amendment to the Securities Exchange Act of 1934, 48 Stat. 881).[2]

SLUSA further authorizes defendants to remove covered class actions to federal court and then enforce SLUSA's preclusion provision through dismissal. 15 U.S.C. § 77p(c) ("Any covered class action brought in any State court involving a covered security, as set forth in paragraph (1), shall be removable to the Federal district court for the district court in which the action is pending, and shall be subject to paragraph (1)['s]" bar); *see* 15 U.S.C. § 78bb(f)(2) (same).

2. Petitioners are individuals who purchased variable annuities from the defendant life insurance companies, AXA Equitable Life Insurance Company, The Variable Annuity Life Insurance Company, Nationwide Life Insurance Company, and AIG SunAmerica Life Assurance Company (collectively, "Companies"). Variable annuities are insurance products that are also deemed to be securities

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[2] A "covered class action" under SLUSA is a class action in which damages are sought under state law on behalf of more than 50 people. 15 U.S.C. § 77p(f)(2)(A); *see* 15 U.S.C. § 78bb(f)(5)(B); *see generally Dabit*, 547 U.S. at 83 & n.8.

because they offer purchasers a choice of investment options through "subaccounts." The Companies offered a range of subaccounts that invested in mutual funds with different investment strategies, including some mutual funds that invested in foreign securities. Pet. App. 3a.

The claims in this case arise from a practice known as "market timing." Most mutual funds calculate their net asset value per share ("net value") once per day – at the New York Stock Exchange's 4:00 p.m. close. Foreign securities are also priced at that time based on their last closing price on foreign exchanges. The prices of foreign securities thus may be several hours old by the time the mutual fund's net value is calculated. If market circumstances have changed in the interim, the prices used to calculate the net value of mutual funds holding foreign securities may be "stale," in that they could either over- or understate those foreign securities' value. *See* Pet. App. 9a n.3; *In re Mutual Funds Investment Litigation*, 437 F. Supp. 2d 439, 440 n.1 (D. Md. 2006). For example, "if U.S. stocks rally after the international markets have closed for the day, the value of the international securities on that day will not reflect the rise in the U.S. market.'" Pet. App. 9a n.3 (quoting Roberto M. Braceras, *Late Trading and Market Timing*, 37 Rev. Sec. & Commodities Reg. 61, 64 (April, 14, 2004)).

Petitioners allege that market-timing traders took advantage of the arbitrage opportunity created by stale pricing by buying or selling shares of a subaccount, depending on whether they believed those securities were undervalued or overvalued, and then quickly selling or buying the shares once the

market prices adjusted. Petitioners further allege that this "market timing" activity diluted the value of the investments held by other annuity owners who invested for the long-term and did not engage in short-term trading. Pet. App. 13a.

3. Petitioners filed multiple complaints in Illinois state court seeking certification of a class consisting of all variable annuity policyholders who had invested through their subaccounts in mutual funds containing foreign securities and who had not engaged in market timing. Pet. App. 8a-9a. The "materially indistinguishable" complaints (Pet. App. 9a) alleged that each of the Companies acted negligently and/or recklessly by relying upon allegedly stale prices in calculating the value of policyholders' investments. Pet. App. 4a. Petitioner Mehta specifically alleged that the pricing practices were "fraudulent" and "likely to deceive." C.A. J.A. 63. All of the complaints alleged that the Companies deceived policyholders by failing to inform them of the potential for market timing and the harm it could entail. *See id.* at 61, 95, 128, 239.

The Companies removed their respective actions to the United States District Court for the Southern District of Illinois and then moved to dismiss the complaints on the ground that the claims were precluded by SLUSA. Pet. App. 14a.[3] Before the court ruled on the motions, however, the Judicial Panel for Multidistrict Litigation transferred the actions to the United States District Court for the District of Maryland. *Ibid.*

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[3] AIG SunAmerica Life Assurance Company moved for judgment on the pleadings rather than to dismiss. Pet. 10.

After the cases were transferred, each of the petitioners amended their complaints, but petitioner Mehta later moved to withdraw her amended complaint because AIG SunAmerica Life Assurance Company had already answered the original complaint and moved for judgment on the pleadings. C.A. J.A. 500. The amended complaints continued to allege that the Companies were responsible for mispricing shares in the underlying mutual funds and valuing the corresponding subaccounts at levels that were "artificially high" or "artificially low." *See, e.g.*, C.A. J.A. 284, 302, 315, 519. At the same time, petitioners eliminated any explicit mention of deception or misrepresentation in their complaints, alleging instead that the Companies had acted negligently by failing both to price the subaccounts properly and to otherwise protect policyholders from market timing. Pet. App. 14a.[4]

AXA Equitable, Variable, and Nationwide moved to dismiss the amended complaints as, *inter alia*, precluded by SLUSA, Pet. App. 14a, while AIG's original motion for judgment on the pleadings sought dismissal on the same grounds, Pet. 12 n.8.

The district court granted the Companies' motions to dismiss. Pet. App. 8a-18a. Explaining that SLUSA precludes an action that "alleges a misrepresentation concerning the value of the securities sold or the consideration received in return," the district court found that "[t]hat is exactly what the plaintiffs have done here, despite their

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[4] Because petitioner Mehta moved to withdraw her amended complaint, her operative pleading remains her original complaint, which explicitly alleges fraud and deception.

emphatic disavowal of their prior explicit allegations of misrepresentation, and their pared-down amended complaint." Pet. App. 16a (quoting *Araujo v. John Hancock Life Ins. Co.*, 206 F. Supp. 2d 377, 382 (E.D.N.Y. 2002)). The court explained that, "at bottom," Pet. App. 16a, the petitioners' complaints involved "a misrepresentation or omission of a material fact in connection with the purchase or sale of a security," because they alleged that "the defendants incorrectly priced certain investment options," *id.* at 15a (citing 15 U.S.C. § 78bb(f)(1)(A)).

The court further explained that "plaintiffs concede[d] as much in their opposition memoranda," because they argued that, "'to the extent that [the Companies] may be said to have 'misrepresented' the purchases or sales of the annuity's unit values, it * * * was in connection with the market timers' purchase and sales of annuity units.'" Pet. App. 16a n.10. The district court accordingly held that petitioners' "artful attempt at avoiding SLUSA preemption ultimately fails," and granted the Companies' motions to dismiss. *Id.* at 18a.

4. The court of appeals unanimously affirmed (Pet. App. 1a-7a) in an unpublished per curiam order "based substantially on the reasoning of the district court" (*id.* at 7a). Petitioners did not seek rehearing en banc.

ARGUMENT

The district court dismissed petitioners' complaints based on a record-bound analysis of petitioners' allegations and the distinctive procedural history of these cases. The court of appeals' unpublished affirmance of that decision comports with the rulings of this Court and every other court of

appeals to address the SLUSA-pleading question. Accordingly, this Court's review is not warranted.

1. The court of appeals' affirmance of the district court's decision hews to settled law preventing the use of "artful pleading" by plaintiffs to avoid preemption or preclusion of their claims. SLUSA adopts the same statutory standard for both removal and preclusion of a covered class action, focusing in both instances on what the "class action" is "alleging." *See* 15 U.S.C. § 77p(c); 15 U.S.C. § 78bb(f)(2). As a result, SLUSA serves both "as an express exception to the well-pleaded complaint rule," for removal purposes, and as a substantive bar to litigation the "preemptive force" of which "cannot be circumvented by artful drafting." *Rowinski v. Salomon Smith Barney, Inc.*, 398 F.3d 294, 304 (3d Cir. 2005); *see U.S. Mortgage, Inc. v. Saxton*, 494 F.3d 833, 842 (9th Cir. 2007) (same).

The law in this Court is settled that "'a plaintiff may not defeat removal by omitting to plead necessary federal questions.'" *Rivet v. Regions Bank*, 522 U.S. 470, 475 (1998) (quoting *Franchise Tax Bd. of Cal. v. Construction Laborers Vacation Trust for Southern Cal.*, 463 U.S. 1, 22 (1983)). Consequently, "[i]f a court concludes that a plaintiff has 'artfully pleaded' claims in this fashion, it may uphold removal even though no federal question appears on the face of the plaintiff's complaint." *Ibid.*

Every court of appeals to address the question has held that the statutory test for SLUSA preclusion textually parallels that well-established "artful pleading" exception to the well-pleaded complaint rule, because preclusion under SLUSA (like the removal inquiry) turns on whether the class action

fairly alleges a statutorily precluded claim. *See Anderson v. Merrill Lynch Pierce Fenner & Smith, Inc.*, 521 F.3d 1278, 1286 (10th Cir. 2008) ("[C]ourts have generally held that SLUSA precludes those claims" that "meet all of the elements of SLUSA" "regardless of how artfully or cleverly plaintiffs attempt to plead them."); *LaSala v. Bordier et Cie*, 519 F.3d 121, 128 (3d Cir.) (SLUSA bars claims that, "no matter how pleaded, in essence allege securities fraud"), *petition for cert. dismissed*, 129 S. Ct. 593 (2008); *Rowinski*, 398 F.3d at 304 (focus on what "reasonable reading of the complaint evidences"); *U.S. Mortgage*, 494 F.3d at 842 (SLUSA cannot be "circumvented by artful drafting"); *Miller v. Nationwide Life Ins. Co.*, 391 F.3d 698, 702 (5th Cir. 2004) (plaintiffs cannot "articulate pleadings that dodge SLUSA") (citing with approval *In re WorldCom, Inc. Securities Litigation*, 308 F. Supp. 2d 236, 244 (S.D.N.Y. 2004)); *Dudek v. Prudential Securities, Inc.*, 295 F.3d 875, 879 (8th Cir. 2002) (SLUSA preclusion cannot be avoided by "artfully concealing the federal question in an otherwise well-pleaded complaint under state law"); *id.* at 879 n.3 ("Congress combined preemption with removal of covered class actions to the federal courts.").

The court of appeals' unpublished decision in this case did nothing more than summarily affirm the district court's application, in the SLUSA preclusion context, of that settled artful-pleading principle to the facts and record in this case. *See* Pet. 13 (acknowledging that "the Fourth Circuit offered no new analysis"). The district court's determination that the claims were precluded turned upon (i) the litigation's unique and procedurally lengthy record, (ii) the timing and nature of the amendments to the

complaint, which evidenced a calculated effort to avoid SLUSA preclusion, and (iii) the fundamental character of the "negligence" claim as founded on the alleged misrepresentation of securities prices and/or the omission of material factual information. Pet. App. 16a-18a.

The district court explained, moreover, that its assessment was confirmed by petitioners' concession in their brief that their claim could be understood as alleging that the Companies "'misrepresented'" the annuities' values. Pet. App. 16a n.10 ("The plaintiffs concede as much in their opposition memoranda."). Based on that case-specific confluence of factors, the district court held that "the plaintiffs' artful attempt at avoiding SLUSA preemption ultimately fails." *Id* at 18a.

The court of appeals' unpublished affirmance of the district court's application in the SLUSA context of the well-settled "artful pleading" rule does not merit this Court's review. The ruling is record-bound, rested in part on the petitioners' own concession in briefing, Pet. App. 16a n.10, and does not establish any new law under the "artful pleading" doctrine or SLUSA. While petitioners may disagree with aspects of the district court's analysis, this Court does not exercise its certiorari jurisdiction to review claims of case-specific error correction.

2. a. The court of appeals' affirmance of the district court's decision comports with the ruling of every other circuit that has addressed the question.

The Seventh Circuit's vacated decision in *Kircher v. Putnam Funds Trust*, 403 F.3d 478 (2005), *vacated*, 547 U.S. 633 (2006), held that plaintiffs could not avoid SLUSA preclusion by framing their complaints

to avoid any explicit allegations of a purchase or sale of securities. *Id.* at 483-484. Like the district court here, the Seventh Circuit reviewed the pleadings and determined that, in substance, "plaintiffs' claims depend on statements made or omitted in connection with *their own* purchases of the funds' securities." *Id.* at 484. The court accordingly held that the claims were precluded.[5]

The Eighth Circuit likewise looks beyond the explicit allegations of the plaintiff's complaint and examines the necessary substance of the claims. Like petitioners here, the plaintiffs in *Dudek* initially filed a complaint alleging misrepresentation and deceit, but later amended their complaint to exclude any explicit reference to those allegations. 295 F.3d at 879. And like the district court decision affirmed by the Fourth Circuit in this case, *Dudek* held that SLUSA preclusion could not be circumvented because the "essence" or "substance" of the plaintiffs' complaint rested upon an untrue statement or substantive omission of material fact in connection with the purchase or sale of a covered security. *Id.* at 880.

Although ignored by the petition, the law in four other circuits is to the same effect. *See Anderson*, 521 F.3d at 1286 (Tenth Circuit joins "courts [that] have

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[5] In any event, *Kircher* would be irrelevant to any claimed circuit conflict because this Court vacated the decision for lack of jurisdiction over the district court's remand order. *Kircher*, 547 U.S. at 648. Petitioners suggest (Pet. 25-26) that this Court should grant review because the propriety of SLUSA dismissal in *Kircher* is now before the Illinois Appellate Court, but the pendency of that action simply confirms the prematurity of certiorari review at this juncture.

generally held that SLUSA precludes those claims – regardless of how artfully or cleverly plaintiffs attempt to plead them"); *U.S. Mortgage*, 494 F.3d at 842 (Ninth Circuit joining "other circuits that have considered the issue [and] have not allowed a plaintiff class to amend its way around a SLUSA dismissal, at least where the amended complaint, 'fairly read,' still contains allegations of fraud or deception involving a covered security"); *Miller*, 391 F.3d at 702 (Fifth Circuit concludes that SLUSA preclusion "hinges on the content of the allegations – not on the label affixed to the cause of action"); *Behlen v. Merrill Lynch*, 311 F.3d 1087, 1096 (11th Cir. 2002) (focusing on what complaint "implicitly alleged"), *cert. denied*, 539 U.S. 927 (2003).

b. Petitioners allege (Pet. 15-17) a conflict based on the Third Circuit's decision in *LaSala v. Bordier et Cie, supra*. That argument fails for two reasons. First, *LaSala* involved the very different and unique questions of (i) whether state-law claims that are pressed by a corporation's bankruptcy trustee on behalf of the corporation fall within a "covered class action" under SLUSA, 519 F.3d at 132-137, and (ii) whether SLUSA precludes *foreign* law claims, *id.* at 137-142. The holdings in that case thus bear little resemblance to the SLUSA questions presented here.

Second, and in any event, the Third Circuit's discussion of SLUSA preclusion echoed the approach taken by each of the other courts of appeals. Just like the Fourth, Fifth, Seventh, Eighth, Ninth, Tenth, and Eleventh Circuits, the Third Circuit explained that "plaintiffs cannot avoid SLUSA by merely altering the legal theory that makes that misrepresentation actionable" when a

misrepresentation remains an essential predicate of the claim based on either the "implicit or explicit" allegations of the complaint. *Id.* at 141 ("[W]hen an allegation of misrepresentation in connection with a securities trade, implicit or explicit, operates as a factual predicate to a legal claim," SLUSA preclusion applies.). Thus, the Third Circuit concluded that SLUSA bars "state-law-based suits that, no matter how pleaded, *in essence* allege securities fraud." 519 F.3d at 128 (emphasis added).

Confirming the point, *LaSala* relied upon the Third Circuit's earlier decision in *Rowinski*, *supra*, which held, in language that parallels the holding of each of the other circuits, that plaintiffs cannot evade SLUSA's bar by "artful pleading," 398 F.3d at 300. As elsewhere, the "question" in the Third Circuit "is not whether a plaintiff pleads or omits certain key words or legal theories, but rather whether a reasonable reading of the complaint evidences allegations of" a SLUSA-barred claim, *id.* at 304. *See LaSala*, 519 F.3d at 128 (following *Rowinski*). Further underscoring the absence of any circuit conflict, *Rowinski* expressly cited and followed the Eighth Circuit's decision in *Dudek* and the Eleventh Circuit's decision in *Behlen*. *See* 398 F.3d at 301, 304.

Indeed, while petitioners rely upon the different verbal formulations that courts have used to describe their substantive inquiry into a complaint's allegations in the SLUSA preclusion context, petitioners do not contend that those differences in articulation have resulted in any material variation in outcomes. *See* Pet. 21-22 (arguing only that the analysis "might have been different" in one case).

More importantly, petitioners do not contend that *their cases* would have been resolved any differently in any other circuit. *LaSala*'s explanation, following *Rowinski*, that the Third Circuit focuses on what a complaint "in essence allege[s]," 519 F.3d at 128, demonstrates that petitioners would fare no better in the Third Circuit than they did in the Fourth Circuit.

Instead, petitioners advocate (Pet. 23) a mechanistic review of the "party's pleadings" that stops at the face of the complaint and ignores any fair or realistic reading of the claims. Every court of appeals has rejected that approach in SLUSA cases, and there is no need for this Court to grant review simply to reiterate the artful pleading rule that has been faithfully and consistently applied by the courts of appeals in SLUSA cases, consistent with congressional direction.

3. The court of appeals correctly affirmed the district court's decision. No matter how artfully pleaded, the essential predicate of petitioners' complaints is that the Companies mispriced certain securities, which led to their artificial inflation or deflation in value. Those allegations that the Companies "cause[d] the [securities' value] to be either artificially high or artificially low," Pet. App. 30a, 49a, 94a; *see id.* at 69a-71a, are functionally indistinguishable from a claim that the Companies misrepresented the true value of the securities, as the district court found petitioners themselves had conceded. Pet. App. 16a n.10. Petitioners' complaints also, at a minimum, rest on the allegation that the Companies failed to disclose material facts by failing to alert shareholders to the alleged market-timing problem and its impact on the value of their

securities. *Id.* at 16a-17a. Whatever the label, those claims are precluded by SLUSA.

Finally, review of the SLUSA issue would do nothing to help petitioners because the complaints are also preempted by the Investment Company Act of 1940, 15 U.S.C. § 80a-1 *et seq.* That Act prescribes the manner in which funds must value the securities in their portfolios, 15 U.S.C. § 80a-2(a)(41)(B), and preempts the field in that area, 15 U.S.C. § 80a-49. In addition, the 1940 Act vests regulatory control over the valuation of securities in private securities associations and, ultimately, the SEC. 15 U.S.C. § 80a-22(a),(c); *see United States v. National Ass'n of Securities Dealers, Inc.*, 422 U.S. 694, 710 n.19 (1975). Neither the court of appeals nor the district court reached that question. Pet. App. 7a n.2, 14a n.8.[6]

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[6] Moreover, to the extent the purported negligence claims simply allege mismanagement by corporate officials, they "likely would need to be cast as a derivative action, which none of these suits purports to be." *Kircher*, 403 F.3d at 483.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

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